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[21] In this regard, it appears that the learned sessions court judge overlooked this mandatory requirement. It was not revealed in the judgment of the learned judge the reason why the mandatory whipping was not
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[22] It could be seen therefore that the learned sessions court judge erred in applying the correct principles of sentencing in this instant case. As such, I am satisfied that the learned judge appears to be embarking on extraneous exercise of discretion as envisaged in the decision of the Federal Court in
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[23] Considering public interest as outlined earlier, coupled with the need to reflect the gravity of the crime and the background and antecedents of the accused in this instant case. I feel that the five-year sentence would not be
E appropriate.

[24] There should be a 'turning of tide' in favour of appropriate sentence for rape cases to reflect the abhorrence of society against rapists. This court takes judicial notice of the frequent reports in the national and local newspapers of incidents of rape. Sometimes these can be brutal and have understandably
F triggered an outpouring of rage with mounting public pressure to come down hard on rapists. Let the message be heard, loud and clear, that in this court there is a zero tolerance on rape. No one who has committed an offence of rape can expect, upon conviction, to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be sentenced or punished
G with the maximum allowed by the law. The maximum sentence for this offence is not more than 20 years imprisonment and shall also be liable to whipping.

[25] Having regard to the antecedents of the accused and taking in totality his plea of guilt, his age, it is my considered view that a sentence of fifteen
H years imprisonment and five strokes of 'rotan' will be appropriate. The sentence of the learned sessions court judge is accordingly substituted.

Appeal allowed.

I Reported by John Paul Simon

A been given the benefit of having his plea on this rape case being taken at around the time when he committed the other offences. The judge was further of the view that the rape charge was stale since the accused was only charged at the end of 2001. The prosecution appealed contending that the sentence was manifestly inadequate.

B

Held, allowing the appeal:

(1) The facts in the instant case differed substantially with the facts in *Tukiran*. In *Tukiran*, the accused was charged with the theft of coconuts — an offence of a less serious nature compared to the rape of the 13-year-seven-month-old niece of the accused in the instant case. It was unfortunate that although the seriousness of the offence was appreciated by the sessions court judge, the sentence of five-year imprisonment sentence did not reflect society's abhorrence but instead decried the seriousness of the crime (see paras 12 and 13); *Tukiran bin Taib v PP* [1955] MLJ 24 not followed.

(2) The case of *Tukiran* was decided in 1955 when the age of majority was 21 years. Pursuant to the Age of Majority Act 1971, the accused in the instant case, who was above 18 at the time of the commission of the crime, was no longer a minor. He was in fact an adult pursuant to the Child Act 2001. He knew what he had done and had to be made responsible for his action. The sessions court's judgment failed to consider the tragedy, horror, suffering endured by the victim, the embarrassment felt not only by the victim but her family as well. In the circumstances a five-year imprisonment sentence was misplaced leniency (see para 15).

(3) The issue of the offence being stale did not arise at all on the facts. Here, the offence was that of rape on an underaged girl. Though the offence was committed in January 1999 and the accused only charged with it in December 2001, there were obvious reasons why this was so. The accused was sent to the Henry Gurney school pursuant to the magistrate's order of 5 May 2000 and released only in February 2001. He was thus not charged during the time he was in the school (see para 18).

(4) The sessions court judge had given the accused a discounted sentence for his plea of guilt. However it is clear that the giving of such a discount is not a strict rule of law. The court may refuse to grant a discount notwithstanding a guilty plea where the public interest demands a deterrent sentence. On the facts, the discount in sentence given by the sessions court judge ran contrary to established authorities (see para 19).

(5) For reasons not revealed in the sessions court's judgment, the judge overlooked the mandatory whipping provision. The sessions court judge had clearly erred in applying the correct principles of sentencing in the instant case. The judge appeared to embark on an extraneous

exercise of discretion. The sentence of five years' imprisonment was not appropriate and ought to be substituted. Having regard to the antecedents of the accused and taking in totality his plea of guilt and his age, a sentence of 15 years' imprisonment and five strokes of the 'rotan' was appropriate (see paras 19, 21 and 25).

[Bahasa Malaysia summary

Tertuduh dituduh dengan kesalahan merogol di bawah s 376 Kanun Keseksaan. Mangsa tertuduh merupakan anak saudaranya yang berumur 13 tahun tujuh bulan pada masa kesalahan dilakukan iaitu 11 Januari 1999. Kesalahan tersebut dilakukan secara amat kejam dan mengakibatkan mangsa tersebut cedera parah. Tertuduh hanya dituduh kerana perbuatannya pada 31 Disember 2001 iaitu sejurus selepas dia dilepaskan daripada Sekolah Henry Gurney di mana dia telah ditahan kerana kesalahan dengan tidak jujur menerima barangan yang dicuri serta kesalahan pecah rumah, mengikut perintah mahkamah majistret bertarikh 5 Mei 2000. Sebelum tertuduh ditahan, dia juga telah dituduh pada 8 Oktober 1997 kerana kesalahan di bawah s 379 Kanun Keseksaan tetapi telah dilepaskan atas bond kelakuan baik. Tertuduh mengaku bersalah di atas tuduhan merogol di mahkamah sesyen dan dia dijatuhkan hukuman penjara selama lima tahun. Semasa menjatuhkan hukuman tersebut, hakim yang bijaksana mengambil kira pengakuan bersalah yang dibuat oleh tertuduh, rekodnya yang bersih setelah dilepaskan daripada Sekolah Henry Gurney dan bahawa tertuduh baru sahaja mencapai umur 19 tahun semasa kesalahan tersebut dilakukan. Hakim mahkamah sesyen menimbangkan dan mengikut kes *Tukiran bin Taib v PP* [1955] MLJ 24 di mana telah diputuskan oleh mahkamah bahawa pesalah berumur 17 hingga 21 tahun tidak patut dipenjarakan. Tambahan pula, hakim tersebut berpendapat bahawa tertuduh patut diberi peluang untuk membuat pli untuk kes rogol pada lingkungan masa yang sama dengan apabila dia melakukan kesalahan yang lain. Hakim tersebut juga berpendapat bahawa tuduhan rogol tersebut telah basi kerana tertuduh hanya dituduh pada akhir tahun 2001. Pihak pendakwa membuat rayuan ini dengan menegaskan bahawa hukuman yang dijatuhkan adalah tidak memadai.

Diputuskan, membenarkan rayuan itu:

(1) Fakta-fakta di dalam kes ini berlainan dengan fakta-fakta di dalam kes *Tukiran*. Di dalam kes *Tukiran*, tertuduh dituduh kerana mencuri buah kelapa — satu kesalahan yang kurang serius jika dibandingkan dengan tertuduh di dalam kes ini yang merogol anak saudaranya yang berumur 13 tahun tujuh bulan. Walaupun hakim mahkamah sesyen peka terhadap keseriusan kesalahan ini, hukuman lima tahun yang dijatuhkan tidak mencerminkan kebencian masyarakat terhadap kesalahan sebegini tetapi mengurangkan keseriusannya (lihat perenggan 12 dan 13); *Tukiran bin Taib v PP* [1955] MLJ 24 tidak diikut.

(2) Kes *Tukiran* diputuskan pada tahun 1955 dan pada masa itu umur majoriti adalah 21 tahun. Mengikut Akta Umur Dewasa 1971, tertuduh di dalam kes ini, yang berumur lebih daripada 18 tahun pada masa kesalahan dilakukan, tidak merupakan seorang di bawah umur majoriti. Dia sememangnya seorang dewasa seperti yang dinyatakan dalam Akta Kanak-Kanak 2001. Dia memahami kesalahannya dan perlu mengambil tanggungjawab atas tindakannya. Keputusan mahkamah sesyen gagal mengambil kira tragedi, kengerian dan penderitaan yang menimpa mangsa serta keaiban yang dirasai bukan sahaja oleh mangsa tetapi juga keluarga mangsa. Dalam keadaan ini, hukuman penjara selama lima tahun terlalu ringan (lihat perenggan 15).

(3) Isu kesalahan ini menjadi basi tidak timbul sama-sekali. Kes ini melibatkan rogol seorang budak perempuan di bawah umur. Walaupun kesalahan ini dilakukan pada January 1999 dan tertuduh hanya dituduh pada Disember 2001, terdapat sebab-sebab yang jelas mengapa ini berlaku. Tertuduh telah dihantar ke Sekolah Henry Gurney mengikut perintah magistret bertarikh 5 Mei 2000 dan hanya dibebaskan pada Februari 2001 (lihat perenggan 18).

(4) Hakim mahkamah sesyen memberi diskaun ke atas hukuman tertuduh kerana tertuduh mengaku bersalah. Walaubagaimanapun, adalah jelas bahawa pemberian diskaun untuk pengakuan bersalah bukanlah satu rukun yang ketat. Mahkamah boleh enggan memberi diskaun walaupun terdapat pengakuan bersalah di mana kepentingan awam memerlukan hukuman yang merupakan langkah pencegahan. Berdasarkan fakta-fakta kes ini, diskaun ke atas hukuman yang diberi oleh hakim mahkamah sesyen bercanggah dengan autoriti-autoriti yang sudah mantap (lihat perenggan 19).

(5) Atas sebab-sebab yang tidak dinyatakan di dalam keputusan mahkamah sesyen, hakim tersebut telah tidak mengendahkan peruntukan hukuman rotan yang mandatori. Hakim mahkamah sesyen telah jelas tersilap dalam memakai prinsip-prinsip hukuman di dalam kes ini. Hakim tersebut telah menggunakan budi bicara yang keterlaluan. Hukuman penjara lima tahun yang dijatuhkan tidak memadai dan perlu diganti. Dengan mengambil kira latar belakang tertuduh dan pengakuan salahnya serta umurnya, hukuman penjara selama 15 tahun serta lima kali sebatan rotan merupakan hukuman yang setimpal (lihat perenggan 19, 21 dan 25).]

Notes

For a case on inadequacy of sentences, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3954.

For cases on sentencing generally, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3898–4007.

For a case on statutory rape, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 3828.

For cases on stale charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1290–1291.
For cases on s 376 Penal Code, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1591–1613.

Cases referred to

Bachik binAbdul Rahman v PP [2004] 2 MLJ 534 (refd)
Bhanudulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mark Koding [1983] 1 MLJ 111 (refd)
R v Ball [1951] 35 Cr App R 164 (refd)
R v Kenneth John Ball [1951] 35 Cr App R 164 (refd)
Rex v Grondkowski [1946] 1 All ER 560 (refd)
Tukiran bin Taib v PP [1955] MLJ 24 (not folld)

Legislation referred to

Age of Majority Act 1971
Child Act 2001 s 76
Penal Code ss 376, 379, 411, 454, 457

Wan Abdul Razak (Deputy Public Prosecutor) (Attorney General's Chambers) for the appellant.
Respondent for himself.

Sulong Matjeraie J:

[1] This is an appeal by the prosecution against the sentence of five years imposed on the accused/respondent (hereinafter referred to as 'the accused') after he pleaded guilty to a charge under s 376 of the Penal Code for rape. The prosecution submits that such a sentence was manifestly inadequate.

FACTS OF THE CASE

[2] According to the agreed facts of the case, the accused raped his niece at 9.30am on 11 January 1999. His niece was only 13 years seven months old at the time of the commission of the crime. She was raped by the accused in the house of the complainant, the mother of the victim and who is also the elder sister of the accused. The complainant was then washing her cloth at a nearby river.

[3] On the fateful day, when the accused came back from work he found that only the victim was in the house. She was then at the guests' area of the house. The accused got hold of her. He started to grope and fondle her breast and lifted her up and brought her to her brother's bedroom. He put her down

on her brother's bed. The victim tried to put up a fight but failed and was warned by the accused not to make any noise. The accused took off her pants and her underwear and placed the victim in a prostrate position and penetrated her from behind. He however stopped when the victim screamed in pain.

[4] As a result, the vagina of the victim was bleeding ceaselessly. She was sent to the Queen Elizabeth Hospital for examination. It was confirmed by the hospital's obstetric and gynaecology consultant that there were 'fresh tear of the hymen at five and seven o'clock with a haematoma at five o'clock position' and her 'posterior fourchette was torn' as well.

[5] A probation report of the accused prepared by the probation officer on 28 January 2002 *inter-alia*, revealed as follows:

(a) at the time the report was made, the accused was staying with his parents together with his wife and an infant daughter. They live in a wooden kampong house with basic amenities like electricity and water;

(b) This offence of 'rape' was the third offence committed by the accused. The other offences for which he was convicted were:

(i) On 8 October 1997 he was charged under s 379 of the Penal Code, under case No 83–334 of 97 and was released on a bond of good behaviour for one year in the sum of RM1,000 in one local surety;

(ii) On 5 May 2000 the accused was charged in cases No 83–330 of 2000, 83–331 of 2000 and 83–332 of 2000 under s 411 of the Penal Code (Dishonestly receiving stolen property). Section 454, s 457 of the Penal Code (Housebreaking). The Magistrate Court ordered that he be sent to Henry Gurney School until he reaches the age of 21.

[6] These offences, including the charge for rape, were committed by the accused when he was 19 years of age after he was released on a bond of good behaviour but before he was sent to Henry Gurney School. He was only released from the said Henry Gurney School on 19 February 2001.

DECISION OF THE LEARNED SESSIONS COURT JUDGE

[7] It is observed that the learned sessions court judge, in her judgment, noted that the respondent has reformed after his release from Henry Gurney School and took his responsibility as a husband and father seriously and have not committed any offence since then. He no longer smokes, drinks or takes drugs or cough mixtures. He asked for leniency and a chance to start afresh with his wife and child for he truly regrets his past actions.

[8] In meting out the five years sentence the learned judge took into consideration the guilty plea made by respondent, the clean record after his release from Henry Gurney School and that the accused has just turned 19 at the time he committed the crime. The learned sessions court judge considered and followed the case of *Tukiran bin Taib v Public Prosecutor* [1955] MLJ 24 (hereinafter referred to as 'the *Tukiran* case') where the court took the view that offenders aged 17 to 21 years should be kept away from prison. Further, she was also of the view that the accused should have been given the benefit of having his plea on this rape case being taken at around the time when he committed the other offences. The learned judge lamented that the accused could have been sentenced justly for the totality of his crime.

[9] Another matter that was considered by the learned judge was that the offence was 'stale' The offence 'was committed in 1998 but the accused was not charged until the end of 2001'. It was the view of the learned judge that 'the waiting period may be considered during sentencing'; see *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111. Quoting Hilbery J in *R v Ball* [1951] 35 Cr App R 164 she opined that 'the public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living'.

[10] While appreciating the seriousness of the offence, the learned sessions court judge was of the view that the rehabilitative aim of sentencing as opposed to the retributive or the deterrent aim would best serve the public interest in this case. In the circumstances, it was the considered view of the learned sessions court judge that the sentence of five years imprisonment of the accused for the offence of rape is right and just.

GENERAL PRINCIPLES

[11] It is an established practice that the High Court will not alter a sentence imposed by the lower or subordinate court merely because it might have passed a different sentence. In the exercise of its revisionary powers, the High Court may do so if it is satisfied that the sentence imposed is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles of assessment of the sentence; see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256. Hashim Yeop Sani J (as he then was) remarked at p 258B in the said case that the correct approach is to 'strike a balance, as far as possible, between the interests of the public and the interests of the accused'.

[12] Although the spirit and principle in the *Tukiran* case, which was considered and adopted by the learned sessions court judge, is still preserved as reflected in s 76 of the Child Act 2001 (Act 611), I am of the humble view that this instant case differ substantially with the *Tukiran* case. At least three significant distinctions could be observed.

[13] Firstly, whilst the accused in the *Tukiran* case was found guilty of stealing 176 coconuts, an offence, in my view of a less serious nature, this instant case relates to the commission of a heinous despicable crime of rape. On top of that it is a rape on a school girl of 13 years seven months old. What is more appalling is that it was also an incestuous relationship. the victim being his own niece. It is unfortunate that although the seriousness of the offence was appreciated by the learned sessions court judge, the sentence of imprisonment of five years does not reflect the society's abhorrence but would instead deprecate the seriousness of the crime.

[14] There had been an especially dramatic rise in reported rape cases in the country. In a paper entitled '*Penalties and Attitudes in Preventing Rape*' by Pn Roosniza Mohd Shariff reported in the Malayan Law Journal [2005] 1 MLJ Ivii, at p lix, it was reported that 'according to the Rape Report on Malaysia, in 1993 there were 879 such cases, or 2.4 cases per day. This increased to 1,539 in 1998, or 4.2 cases per day. In 2002, statistics from the Royal Police Department showed that 1418 rape cases were reported. By age, more than half (55.8%) of the victims were under 16 years of age. This translated into a daily frequency of 3.31 cases in 2000, 3.70 in 2001, 3.92 in 2002 and 4.05 cases in 2003.' The report further adds that 'if studies that claimed that only one out often rape cases are reported is something to go by, then one can imagine the actual number of rape that occurs in the country in a single day'.

[15] Secondly, the *Tukiran* case was decided in 1955 where the age of majority was 21 years,but following the Age of Majority Act 1971 (Act 21), the accused, who was above the age of 18 at the time of the commission of the crime, was no longer a minor. He was an adult as under the Child Act 2001 only a person under the age of 18 years is considered as a child. He knew what he had done and must be made responsible for his action. Clearly the accused is worthy of punishment as an adult not only because he has betrayed the trust of his own sister but he should realise the trauma inflicted on the victim is unfathomable. This tragedy, horror, suffering endured by the victim, the embarrassmentfelt not only by her but her family as well, failed to be considered in the judgement of the learned sessions court judge. In the circumstances a five-year imprisonment sentence handed down is misplaced leniency.

[16] Thirdly, while recognising that Tukiran bin Taib was a first offender, the learned Bellamy J said: 'It has been stressed by this court that it is very desirable that young offenders, that is offenders between the ages of 17 and 21 years, *who are also first offenders*, should be kept out of prison, *if possible*'. (Emphasis added.) On the otherhand, the accused in this instant case had previously been charged under ss 379, 411, 454 and 457 of the Penal Code. In the circumstances, the *Tukiran* case is hardly applicable here.

THE OFFENCE WAS 'STALE'

[17] The learned sessions court judge viewed that the offence was 'stale' in that the offence 'was committed in 1998 but the accused was not charged till

the end of 2001'. Quoting the case of *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111, it was the view of the learned judge that 'the waiting period may be considered during sentencing'.

[18] It is to be noted that unlike this instant case, *PP v Mark Koding* relates to a charge for uttering seditious words in the Dewan Rakyat an offence under the Sedition Act. I am of the view that since this instant case involves raping an underage girl; the question of the offence being 'stale' should not arise at all. As mentioned earlier, the offence of rape was committed by the accused on 12 January 1999 and he was charged on 31 December 2001. There is, I believe, an explanation here as the accused was sent to Henry Gurney School on 5 May 2000 and was only released on 19 February 2001. For obvious reason he was not charged in court while he was still at the Henry Gurney School.

CREDIT GIVEN IN A CASE WHERE A PERSON PLEADS GUILTY

[19] It would appear that the learned sessions court judge gave credit to the accused in viewof his guilty plea. Although it is generally accepted that a normal reduction of the sentence is between one fourth to one third of what would otherwise have been imposed; see *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, this is not a strict rule as the court may refuse to grant any discount. It is to be observed that where public interest demands a deterrent sentence, the guilty plea will not automatically entitle an accused to a lesser punishment; per Augustine Paul JCA, in *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534. I am of the view that the discount given by the learned sessions court judge runs contrary to the above mentioned authorities. One of the reasons given for the petition of appeal was that the learned sessions court judge appears to be over sympathetic to the mitigation plea of the accused. I am more inclined to agree with that submission and would wish to quote what Lord Goddard said in *Rex v Grondkowski* [1946] 1 All ER 560, 561: 'The judge must consider the interests of justice as well as the interests of the prisoners. It is too often thought, or seems to be thought, that the interest of justice means only the interests of the prisoners'. To this, I would add what Hilbery J said in the celebrated case of *R v Kenneth John Ball* [1951] 35 Cr App R 164, 165: Before passing sentence it is necessary that the 'court hears evidence of the antecedents and character of every convicted person'. A court should always be guided by certain consideration in deciding the appropriate sentence. 'The first and foremost is the public interest.'

ELEMENT OF WHIPPING IN RAPE CASES

[20] Quite apart from terms of imprisonment as stipulated under s 376 of the Penal Code, the other element in the penalty provision is that of whipping. The words employed are 'and shall also be liable to whipping'. Applying the natural and ordinary meaning of these words, I am of the view

A that besides imposing imprisonment sentence, the learned judge is required by the said provision to impose whipping on to the accused. There is along line of authorities to say that the existence of the word 'shall' denotes mandatory requirement. In this regard, what was required was that the accused be sentence to a term of imprisonment of not less than five years but
B not more than twenty years AND the accused shall also be liable to whipping.

[21] In this regard, it appears that the learned sessions court judge overlooked this mandatory requirement. It was not revealed in the judgment of the learned judge the reason why the mandatory whipping was not
C imposed onto the accused.

[22] It could be seen therefore that the learned sessions court judge erred in applying the correct principles of sentencing in this instant case. As such, I am satisfied that the learned judge appears to be embarking on extraneous exercise of discretion as envisaged in the decision of the Federal Court in
D *Bhanudulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 at p 84A-B.

[23] Considering public interest as outlined earlier, coupled with the need to reflect the gravity of the crime and the background and antecedents of the accused in this instant case. I feel that the five-year sentence would not be
E appropriate.

[24] There should be a 'turning of tide' in favour of appropriate sentence for rape cases to reflect the abhorrence of society against rapists. This court takes judicial notice of the frequent reports in the national and local newspapers of incidents of rape. Sometimes these can be brutal and have understandably
F triggered an outpouring of rage with mounting public pressure to come down hard on rapists. Let the message be heard, loud and clear, that in this court there is a zero tolerance on rape. No one who has committed an offence of rape can expect, upon conviction, to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be sentenced or punished
G with the maximum allowed by the law. The maximum sentence for this offence is not more than 20 years imprisonment and shall also be liable to whipping.

[25] Having regard to the antecedents of the accused and taking in totality his plea of guilt, his age, it is my considered view that a sentence of fifteen
H years imprisonment and five strokes of 'rotan' will be appropriate. The sentence of the learned sessions court judge is accordingly substituted.

Appeal allowed.

I Reported by John Paul Simon